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Mr. Barry:

Re: Section 251 and Exchange Access

This is in response to your request for an analysis of the question as to whether or not Section 251 of the Telecommunications Act of 1996 ("the Act") preempts the current equal access obligations of the Bell Companies. Specifically, you have asked whether or not the duty to interconnect contained in Section 251(c)(2), the duty to offer unbundled network elements contained in Section 251(c)(3), and the pricing standards for interconnection and network elements contained in Section 252(d)(1) supersede the existing equal access obligations and access charge structure for compensating local exchange carriers for the use of local exchange facilities to originate and terminate interexchange calls.

The answer to this question is that the language of the Act itself and the legislative history reflect Congressional intent that Section 251 ensure access and interconnection for competing telecommunications service providers, and that the existing exchange access provisioning and compensation methodologies remain in effect until superseded by the Federal Communications Commission ("Commission"). Thus, until the Commission conducts a rulemaking proceeding to examine the continued efficacy of the current exchange access and interconnection requirements that have been previously imposed by consent decree and Commission rules, Section 251 may not be used by interexchange carriers to order local exchange facilities for the provision of exchange access or to circumvent the payment of access charges

**The Language Of Section 251**

The express language of Section 251 demonstrates Congressional intent that this section initially provide for interconnection between competing local exchange carriers only. A careful reading of Section 251 also makes it abundantly clear that it does not preempt the existing equal access and access charge regime. The Commission must undertake a separate rulemaking proceeding to supersede these requirements.

Section 251 generally defines the interconnection obligations of all telecommunications carriers, specifically defines the obligations of all local exchange carriers, and imposes additional obligations on incumbent local exchange carriers. Section 251(a) states that "(e)ach telecommunication carrier has the duty -- (1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers;..." Section 251(b) imposes upon all local exchange carriers the duty (1) not to prohibit resale of their services, (2) to provide number portability, (3) to provide dialing parity and access to telephone numbers, operator services, directory assistance and directory listing, (4) to provide access to rights-of-way, and (5) to establish reciprocal compensation arrangements for the transport and termination of telecommunications. And, finally, Section 251(c) imposes additional obligations on incumbent

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local exchange carriers, including the duty (1) to negotiate interconnection agreements in good faith, (2) to provide for interconnection for any requesting telecommunications carrier, (3) to provide to any requesting telecommunications carrier unbundled access to network elements, (4) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not carriers, (5) to provide reasonable notice of changes in information necessary for the transmission and routing of services utilizing its facilities or networks, and (6) to provide for physical collocation unless it is not practical for technical reasons, and in that event to provide for virtual collocation. Therefore, the express language of Section 251(a)-(c) does not appear to prohibit interexchange carriers from requesting local exchange carrier facilities for exchange access. However, when one carefully considers Section 251(a)-(c) and Section 251(g) together, it becomes obvious that Congress did not intend that mere passage of the Act preempt the current equal access and access charge regime.

Section 251(c)

Specifically, Section 251(c)(2) imposes "(t)he duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network -- (A) for the transmission and routing of telephone exchange service and exchange access...." This section requires an incumbent local exchange carriers to interconnect with any requesting telecommunications carrier for its provision of telecommunications exchange and exchange access services. (Emphasis added.) Thus, Section 251(c)(2) imposes no new obligation on the Bell Companies, or any other local exchange carrier with an equal access obligation, vis-a-vis the interexchange carriers. Prior to enactment, these carriers already had an obligation to interconnect with interexchange carriers for the purpose of originating and terminating interexchange toll traffic.

Section 251(c)(3) imposes "(t)he duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point...." Section 153(45) defines "network element" to mean:

> "a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service."

In determining what network elements should be made available, Section 251(d)(2)(B) requires that the Commission consider, at a minimum, whether "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."

Similarly here, Section 251(c)(3) imposes no new obligation on the Bell Companies or

other local exchange carriers with an equal access obligation. They are already providing the interexchange carriers with "exchange access" -- that is, unbundled access to those network elements which are necessary to enable the interexchange carriers to provide interexchange toll services. Accordingly, the Commission does not need to consider what network elements should be made available to provide exchange access for interexchange carriers. Moreover, a failure or refusal by a local exchange carrier under this section, to provide to interexchange carriers any new or different network elements for the purpose of originating or terminating interexchange traffic would not impair the ability of those carriers to provide service. The existing exchange access regime already provides a mechanism for interexchange carriers to obtain new exchange access arrangements from the local exchange carriers.

It is, therefore, not a credible argument that Section 251(c) provides interexchange carriers with a new statutory right to obtain the necessary interconnection arrangements and network elements to originate and terminate interexchange services, and thereby to avoid the payment of access charges under the current regime.

Section 251(g)

Section 251(g) provides further proof of Congressional intent that the access and interconnection obligations contained in Section 251(c) do not replace the existing exchange access requirements in place on the date of enactment. Section 251(g) provides that on and after enactment:

> "each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment."
> (Emphasis added.)

The Bell Companies' exchange access obligation was derived from the Modification of Final Judgment ("MFJ") preceding the date of enactment. The equal access and exchange access obligations of the MFJ can be found in Section II and Appendix B. The GTE equal access obligation was derived from its own consent decree. United States v. GTE Corp., §§ V(A) and (B), No. 83-1298 (D.D.C. December 21, 1984).

In 1983, at about the same time as the AT&T and GTE cases were being resolved and implemented, the Commission initiated CC Docket No. 78-72, MTS and WATS Market Structure to implement equal access and to establish the access charge rate structure for exchange access

services for interstate interexchange services. The resulting regulations were codified as Part 69 of the Commission's rules. 47 C.F.R. §69.1 et seq. In 1985, the Commission imposed an equal access obligation upon the independent telephone companies, albeit one with less strict implementation requirements than were imposed by court order upon by the Bell Companies and GTE. Report And Order, In the Matter of MTS and WATS Market Structure Phase III, CC Docket No. 78-72, Phase III, March 19, 1985. Each of the States similarly implemented an intrastate access charge regime for exchange access services provided by local exchange carriers for intrastate interexchange services.

Thus, on the date of enactment, the entire local exchange carrier industry was providing equal access and exchange services for such access pursuant to consent decrees, or pursuant to regulation, order, or policy of the Commission. Congress expressly provided that such exchange access and interconnection requirements would continue and "be enforceable in the same manner as regulations of the Commission" until superseded by the Commission.

Section 251(d)(3)

Despite the Commission's authority under Section 251(g) to supersede existing exchange access obligations and access charge arrangements, Section 251(d)(3) still preserves State authority over the terms and conditions of intrastate access and interconnection arrangements. Section 251(d)(3) provides that in prescribing and enforcing regulations to implement this section, "the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that -- (A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part." (Emphasis added.)[1]

**The Language Of Section 252**

Further support for the conclusion that Congress intended to continue the existing exchange access regime can be found in Section 252 of the Act, which defines the pricing standards for interconnection and for network elements. Section 252(d)(1) provides that the State commissions shall determine the just and reasonable rates for interconnection under Section 251(c)(2) and for network elements under Section 251(c)(3). Thus, if the interexchange carriers attempted to obtain interconnection and network elements under Section 251 for the purpose of originating and terminating interexchange traffic, it would be the State commissions under Section 252 which would determine the prices for those services.

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[1]In addition, in Section 261(c), Congress generally provided that "(n)othing in this part [Part II of Title II] precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part of the Commission's regulations to implement this part." (Emphasis added.)

However, under the current regime for the provision of exchange access at both the state and interstate level, the exchange access revenue requirement -- that is, the cost of providing the interconnection and unbundled network elements to originate and terminate interexchange traffic -- is split between the state and interstate jurisdictions by the separations process. The state and interstate exchange access revenue requirement is then recovered through both state and interstate access charges which are set by the State commissions and the Commission respectively. Congress did nothing in the Act to change the separations process. Accordingly, if the interexchange carriers are correct that they can now obtain interconnection and network elements for exchange access under Section 251, the State commissions have complete authority under Section 252 to determine the reasonableness of the rates for interconnection and those network elements necessary for exchange access. If that were the case, there exists no mechanism to recover the separate interstate revenue requirement for exchange access services for interstate interexchange services. Surely, Congress did not intend this result.

**The Legislative History Behind Section 251**

The legislative history also clearly indicates that Congress intended that initially Section 251 would only apply to interconnection between competing providers of local exchange services. The Joint Explanatory Statement Of The Committee Of Conference ("Joint Statement") states that "(t)he conference agreement adopts a new model for interconnection that incorporates provisions from both the Senate bill and House amendment in a new section 251 of the Communications Act." Joint Statement at 121. Thus, in attempting to interpret the meaning to be given Section 251, it is instructive to look at the language of the Senate bill, S. 652, and the House amendment, H.R. 1555, which passed both houses of Congress respectively, as well as the Joint Statement itself.

Section 251(a)(1) of S. 652 imposed a duty on local exchange carriers, determined to have market power, to negotiate in good faith with other telecommunications carriers that have requested interconnection "for the purpose of permitting the telecommunications carrier to provide telephone exchange or exchange access service;..." (Emphasis added.) The Joint Statement explained that "(t)he obligations and procedures prescribed in this section do not apply to interconnection arrangements between local exchange carriers and telecommunications carriers under section 201 of the Communications Act for the purpose of providing interexchange service, and nothing in this section is intended to affect the Commission's access charge rules." (Emphasis added.) Joint Statement at 117

Section 251(k) of S. 652 provided further that "(n)othing in this section shall affect the Commission's interexchange-to-local exchange access charge rules for local exchange carriers or interexchange carriers in effect on the date of enactment of the Telecommunications Act of 1995." The Joint Statement explained that:

> "New subsection 251(k) provides that nothing in section 251 is intended to change or modify the Commission's rules at 47 C.F.R. 69 et seq. regarding the charges

> that an interexchange carrier pays to local exchange carriers for access to the local exchange carrier's network. The Senate also does not intend that section 251 should affect regulations implemented under section 201 with respect to interconnection between interexchange carriers and local exchange carriers." (Emphasis added.) Joint Statement at 119.

Section 242(a)(1) of H.R. 1555 provided that "(t)he duty under section 201(a) [of the Communications Act] of a local exchange carrier includes ... (t)he duty to provide, in accordance with subsection (b), equal access to and interconnection with the facilities of the carrier's networks to any other carrier or person offering (or seeking to offer) telecommunications services or information services...." The Joint Statement explained that "Section 241(a)(1) sets out the specific requirements of openness and accessibility that apply to LECs as competitors enter the local market and seek access to, and interconnection with, the incumbent's network facilities." (Emphasis added.) Joint Statement at 120.

In addition, Section 242(b)(1) of H.R. 1555 provided that "(a) local exchange carrier shall provide access to and interconnection with the facilities of the carrier's network at any technically feasible point within the carrier's network on just and reasonable terms and conditions, to any other carrier or person offering (or seeking to offer) telecommunications services or information services requesting such access." The Joint Statement explained that "Section 241(b)(1) describes the specific terms and conditions for interconnection, compensation, and equal access, which are integral to a competing provider seeking to offer local telephone services over its own facilities." (Emphasis added.) Joint Statement at 120.

Thus, it is clear that upon the date of enactment, Congress intended that Section 251(a)-(c) govern the access and interconnection arrangements between competing providers of local exchange services.

Finally, the Conference agreement provides further support for this interpretation of Section 251 in its explanation of new Section 251(g). According to the Joint Statement:

> "(t)he approach of both the Senate bill and the House amendment assumed that Bell Operating Companies ("BOCs") would be required to continue to provide equal access and nondiscrimination to interexchange carriers and information service providers under those parts of the AT&T Consent Decree [the MFJ] that would have remained in effect under either approach. Because the new approach completely eliminates the prospective effect of the AT&T Consent Decree, some provision is necessary to keep these requirements in place." Joint Statement at 122.

The Joint Statement made the same observation with respect to ensuring that the GTE operating companies continue to provide equal access and nondiscrimination as well. It went on to describe what was intended by the new Section 251(g):

> "This section provides that, on and after the date of enactment, each local exchange carrier, to the extent that it provides wireline services, shall have a statutory duty to provide equal access and nondiscrimination to interexchange carriers and information service providers. In the interim, between the date of enactment and the date that the Commission promulgates new regulations under this section, the substance of this new statutory duty shall be the equal access and nondiscrimination restrictions and obligations, including receipt of compensation, that applied to the local exchange carrier immediately prior to the date of enactment, regardless of source. When the Commission promulgates its new regulations, the conferees expect that the Commission will explicitly identify those parts of the interim restrictions and obligations that it is superseding so that there is no confusion as to what restrictions and obligations remain in effect."

This confirms that Congress intended that the exchange access obligations and access charge rate structure in effect on the date of enactment is to continue until superseded by the Commission.

**Conclusion**

There is no doubt that Congress clearly intended that, on the date of enactment, the interconnection obligations of local exchange carriers found in Section 251 would apply only to interconnection with competing providers of local exchange service, and not to interexchange carriers seeking exchange access services. It is equally clear that Congress intended that the equal access and nondiscrimination obligations in existence on the date of enactment remain in effect until superseded by the Commission, notwithstanding the new access and interconnection obligations imposed upon local exchange carriers vis-a-vis competing local exchange providers.

Any attempt by the Commission to supersede the existing equal access and exchange access requirements, and access charge structure currently in existence at both the State and federal level, in the rulemaking that it must undertake and complete within 6 months pursuant to Section 251(d)(1), could have profound and most certainly unknown effects upon the entire industry. It is no secret that the access charge structure at both the State and federal level is replete with built-in subsidies designed to recover non-traffic sensitive costs and to support the universal service in order to keep local rates low. Substituting the existing mechanism whereby local exchange carriers provide exchange access and receive compensation for those services with the requirements of Sections 251(a)-(c) and 252(d), without considerable fact finding, thought and deliberation, would be courting with disaster.

Congress surely did not intend that Section 251 of the Act become a substitute for the current regime, without taking into account the effects upon universal service. The only sensible way to address this entire issue would be in the context of the Commission's ongoing consideration of the restructuring of access charges and the Joint Board proceedings called for by Section 254 governing universal service.

Should you have any questions concerning this analysis, I will be happy to discuss them at your convenience.

Martin E. Grambow